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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GUS ADAMS,

Defendant and Appellant.

B278765

(Los Angeles County  
Super. Ct. No. NA099761)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed as modified.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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Gus Adams appeals from his judgment of conviction of first degree residential robbery and burglary. His only challenge is to the one-year prior prison term enhancement based on his earlier conviction of petty theft with priors. (Pen. Code, § 667.5, subd. (b).)<sup>1</sup> The court reduced the theft conviction to a misdemeanor under Proposition 47 before sentencing appellant in this case. (Pen. Code, § 1170.18, subd. (a).) Appellant argues, and respondent concedes, that so reduced the theft conviction that it could no longer support the enhancement under section 667.5, subdivision (b). We agree and modify the judgment accordingly.

### **FACTUAL AND PROCEDURAL SUMMARY**

Appellant's current conviction is based on the burglary of the home of 80-year-old victim Thomas Greer in 2014. Appellant and an accomplice broke Greer's collarbone during the encounter and took off with some \$2,000. Greer fired shots at them, killing the accomplice.

After a jury trial, appellant was acquitted of the accomplice's murder, but was convicted of first-degree residential robbery and burglary as to Greer. The jury also found true allegations that appellant should have known that Greer was over 65 years old and that he inflicted great bodily injury on a person over 70 years old. (§§ 667.9, subd. (a), 12022.7, subd. (c).) The court found that appellant suffered a prior prison term for a petty theft with priors conviction. (§§ 667.5, subd. (b), 666, subd. (a).) The court reduced the petty theft conviction to a misdemeanor under Proposition 47. The court then imposed a six-year base term and a five-year great bodily injury enhancement on the robbery count. It also imposed a one-year

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<sup>1</sup> Statutory references are to the Penal Code.

prior prison term enhancement based on the already reduced prior theft conviction, for a total of 13 years in prison. The court stayed the enhancement based on Greer's age and the sentence on the burglary count. This appeal followed.

## **DISCUSSION**

The parties agree that the enhancement under section 667.5, subdivision (b), must be stricken because the underlying conviction was reclassified as a misdemeanor under Proposition 47 before sentencing in this case occurred. Section 667.5, subdivision (b) provides that when the current offense is a felony, the trial court must impose a one-year enhancement for each prior prison term. The prior prison term enhancement "requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]' [Citation.]" (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.)

Proposition 47, adopted by initiative in 2014, reduced certain drug- and theft-related offenses from felonies or felony-misdemeanors (wobblers) to misdemeanors. Under section 1170.18, subdivisions (a) and (b), a person serving a sentence for a felony conviction who would have been guilty of a misdemeanor under Proposition 47 may petition for recall of the sentence. Under subdivisions (f) and (g), a person who has completed a sentence for a felony conviction may apply to have the felony designated as a misdemeanor. Any felony conviction that is reduced to a misdemeanor under these provisions "shall be considered a misdemeanor for all purposes." (§ 1170.18, subd.

(k).)

The issue whether section 1170.18, subdivision (k) invalidates a prior prison term enhancement where the prison prior has been reduced to a misdemeanor is pending before the California Supreme Court. The appellate courts generally have declined to apply Proposition 47 retroactively to a prior prison term enhancement for an offense reduced to a misdemeanor after the enhancement is imposed, especially where an enhancement is challenged after the judgment has become final. (See, e.g., *In re Diaz* (2017) 8 Cal.App.5th 812, 817–818, review granted May 10, 2017, S240888; *People v. Johnson* (2017) 8 Cal.App.5th 111, 115, review granted Apr. 12, 2017, S240509; *People v. Jones* (2016) 1 Cal.App.5th 221, 228–229, review granted Sept. 14, 2016, S235901; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted April 27, 2016, S233011; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201.)

On the other hand, Proposition 47 has been applied prospectively to prior prison term enhancements, where the underlying offenses had been reclassified as misdemeanors before the enhancements were imposed. (See, e.g., *People v. Call* (2017) 9 Cal.App.5th 856, 863–864; *People v. Evans* (2016) 6 Cal.App.5th 894, 902–903, review granted Feb. 22, 2017, S239635, citing *In re Estrada* (1965) 63 Cal.2d 740; cf. *People v. Abdallah* (2016) 246 Cal.App.4th 736, 739–740, 743, 747, citing *People v. Park* (2013) 56 Cal.4th 782, 802.) The reasoning in those cases is most apposite to appellant’s situation. Because his prior theft conviction was reclassified as a misdemeanor before the section

667.5, subdivision (b) enhancement was imposed, it no longer met one of the requirements for imposition of the enhancement—that the prior conviction be a felony. (See *Call, supra*, at p. 864; *Evans, supra*, at p. 905.) Imposing the enhancement based on a prior theft-related offense also contravened the voters’ determination that certain theft-related offenses should not have been felonies. (*Ibid.*) Its imposition was improper.

### **DISPOSITION**

The section 667.5, subdivision (b) enhancement is ordered stricken. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting the modification and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.